June 3, 2005

By Electronic Mail

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Notice 2005-10: Internet Communications

Dear Mr. Deutsch:

These comments are submitted jointly by the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics in response to the Commission's Notice of Proposed Rulemaking 2005-10, published at 70 Fed. Reg. 16967 (April 4, 2005), seeking comment on proposed changes to Commission rules regarding the application of the campaign finance laws to communications over the Internet.

All three commenters request the opportunity to testify at the hearing the Commission intends to hold on this rulemaking.

For the reasons set forth below, we largely support the adoption of the various rules proposed by the NPRM, subject to the modifications discussed below.

We are aware of the unique features of the Internet and the challenges posed in applying the campaign finance laws to this new medium. We recognize that an aggressive reading of the law with regard to the Internet, as the Commission at times has done in the past,[1] would result in the imposition of impractical and burdensome constraints on political discourse over the Internet, with few corresponding benefits to the underlying principles served by the campaign finance laws.

On the other hand, it is equally true that a *per se* exemption of the Internet from *all* applications of the campaign finance laws is a blunderbuss approach that invites obvious circumvention of important contribution and expenditure limitations in the law, especially in those rules governing political committees, corporations and labor unions.

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[1] For instance, in Ad. Op. 1998-22, the Commission held that an individual using a personal computer at home to engage in express advocacy communications over the Internet, independent of any candidate or party, was making "expenditures" subject to FECA.

The signature virtue of the Internet is that it allows individuals and groups of individuals to engage in robust and widespread, indeed global, discourse for little or no cost. In this sense, the Internet is unlike any other medium that has come before, and it is having significant beneficial effects on our politics.

But it is a logical fallacy to assume that because political discourse can take place on the Internet for very little money, it follows that very large contributions or expenditures cannot or will not be used to finance communications over the Internet to influence elections. They can; they have been, and they will continue to be. And when this happens, the role played in campaigns by the Internet can be very much like that of traditional media – as a means to use large sums of money to finance various forms of communication to influence elections, either in coordination with or independently of a candidate. When the Internet serves that function, the large sums used by a corporation, labor union or wealthy individual – sums that could be in the millions of dollars – pose precisely the same dangers of corruption and the appearance of corruption as large amounts used to finance communications through any other media, such as broadcast or print. And the campaign finance laws should be given full force and effect to guard against these dangers in any form of media, including the Internet.

The challenge posed by this rulemaking, then, is to draw careful lines that strike the right balance, not only to avoid *over-inclusive* regulation that would chill the beneficial use of the Internet at little or no cost for political discourse by individuals, but also to avoid *under-inclusive* regulation that would allow the Internet to become an unregulated haven for unlimited soft money to be used in derogation of the campaign finance laws, and the principles underlying those laws.

I. Procedural context of this rulemaking.

The questions posed by this rulemaking – how best to apply the campaign finance laws to campaign activity on the Internet – pre-date both the Bipartisan Campaign Reform Act of 2002 (BCRA) and the district court decision in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) *appeal pending on other grounds* No. 04-5352 (D.C. Cir.). Although this rulemaking is directly prompted by the court's decision in *Shays*, that case involved only two specific applications of how the campaign finance laws apply to the Internet. The larger (and indeed, thornier) questions about how the campaign finance laws generally apply to activity on the Internet arise not under BCRA, but under the 1974 Federal Election Campaign Act Amendments (FECA), and are questions that the Commission has faced – but largely failed to resolve – for over a decade.

A. Prior Commission rulings. The Commission's Internet jurisprudence, contained mostly in a series of advisory opinions issued since 1995, reflect the challenges of applying pre-existing rules to a new medium. In one of its earliest opinions, the Commission concluded that a Web site operated by a political committee "should be viewed as a form of general public political advertising" and therefore was subject to the disclaimer requirements. Ad. Op. 1995-9.

In another early, and more controversial, opinion, the Commission concluded that a Web site containing express advocacy that was created and maintained by an individual at home was "something of value" to a candidate, and therefore "the costs associated with the creation and

maintaining of the web site" constituted "expenditures" under FECA. Ad. Op. 1998-22. This conclusion triggered disclaimer and potential reporting obligations on the part of the individual under the rules applicable to independent expenditures.

In Ad. Op. 1999-17, the Commission substantially narrowed Ad. Op. 1998-22 by applying the "volunteer exemption" to the costs incurred by a campaign volunteer in preparing a Web site on his or her home computer on behalf of a candidate. Under this exemption, the costs incurred by the individual in creating the Web site would be exempt from the definition of "contribution." The Commission also said the costs of email sent by a campaign volunteer using his or her own computer would be covered by the same exemption.

In Ad. Op. 1999-37, the Commission ruled that emails containing express advocacy sent by a political committee would constitute independent expenditures, subject to disclaimer and reporting obligations if threshold spending amounts were reached.

In two other opinions that year, the Commission held that certain nonpartisan activity conducted over the Internet would be eligible for a statutory exemption from the definition of "expenditure" for nonpartisan voter drives. Ad. Ops. 1999-24, 1999-25.

B. Prior rulemaking proceedings. In addition to case-by-case applications of the law through the advisory opinion process, the Commission has made one prior, but unsuccessful, administrative effort to more comprehensively engage the questions relating to the Internet. In 1999, the Commission published a Notice of Inquiry seeking comments on a wide range of Internet-related issues. NOI 1999-24, "Use of the Internet for Campaign Activity," 64 Fed. Reg. 64360 (Nov. 5, 2001). The Commission there noted that FECA, "and in particular, the contribution and expenditure definitions, are at least facially applicable to a wide range of activity, including some activity that could be conducted on the Internet." *Id.* The Commission invited comment on a long list of topics, including how FECA applies to Web sites created by candidates, individuals, political committees and corporations, on the treatment of "hyperlinking," on whether Internet posting constitute "communications to the general public," on the reportable costs of Internet communications and on the application of the "media exemption," 2 U.S.C. § 431(9)(B)(i), to the Internet.

The Commission received more than 1200 comments on the NOI. One of those was from Democracy 21, a commenter here, which stated in comments filed on January 7, 2000:

> Although the Internet is a powerful engine for democracy, the core values of the Federal Election Campaign Act retain their importance and relevance in this new context. The challenge facing the Commission is to translate these values into clear and enforceable rules and (where necessary) to recommend changes to the Act to produce a sound election law system that appropriately takes account of a new world of individually-driven, decentralized, global communications.[2]

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[2] Comments of Democracy 21 and Common Cause in Notice of Inquiry 1999-24 (Jan. 7, 2000) at 2.

The Notice of Inquiry ripened into a formal rulemaking a year later when the Commission published a Notice of Proposed Rulemaking. NPRM 2001-14, "The Internet and Federal Elections," 66 Fed. Reg. 50358 (Oct. 3, 2001). The NPRM sought comments on only three specific proposed rules: (1) to extend the "volunteer exemption" to individuals using personally-owned computer equipment, software and Internet services to engage in activity on the Internet for the purpose of influencing federal elections, (2) to permit corporations and unions to link to candidate and party committee Web sites without making a contribution or expenditure, and (3) to permit corporations and unions to make candidate endorsements available to the general public on their Web sites.

A considerably smaller number of comments – only 24 – were filed in response to the NPRM, and in March, 2002 the Commission held a hearing at which three witnesses testified. The rulemaking was then held in abeyance, and none of the proposed rules were adopted, leaving in place only the interpretations made by the Commission through its advisory opinions relating to campaign activities on the Internet.

C. BCRA and the *Shays* case. After the passage of BCRA in March, 2002, the Commission undertook a series of rulemakings to implement the new statute. BCRA enacted a new statutory term, "public communication," which is subject to certain rules. The statute defines this term as communication "by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, *or any other form of general public political advertising.*" 2 U.S.C. § 431(22) (emphasis added).

The term "public communication" has three important applications in BCRA:

First, the post-BCRA coordination rules adopted by the Commission provide both content and conduct standards for what constitutes a "coordinated communication" that is, in turn, treated as an in-kind contribution to a candidate or party. 11 C.F.R. § 109.21. The content standards incorporate the term "public communication," *id.* at §§ 109.21(c)(2), (3) and (4), so that only a "public communication" falls within the scope of the coordination rules of section 109.21.

Second, BCRA requires state parties to use hard money for any "generic campaign activity." 2 U.S.C. §§ 431(20)(A)(ii), 441i(b)(1). The Commission's regulation implementing this term limits its scope to include only "public communications" that promote or oppose a political party, not other types of campaign activity by state parties. 11 C.F.R. § 100.25.

Third, BCRA requires state parties to use hard money for "public communications" that "promote, support, attack or oppose" a federal candidate. 2 U.S.C. §§ 431(20)(A)(iii), 441i(b)(1). So-called "PASO" communications by a state party that do not constitute a "public communication" would accordingly be outside this hard money requirement.[3]

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[3] In addition, under pre-BCRA law, section 441d requires a "disclaimer" on a certain communications by a person made on "any other type of general public political advertising." This

(Footnote continued . . .)

In its BCRA rulemaking, the Commission adopted a regulation defining the term "public communication" that simply repeats the statutory language. But in a departure from the statute, the regulation specifies that the term "shall not include communications over the Internet." 11 C.F.R. § 100.26.

This blanket exclusion of the Internet from the term "public communication" thus meant that all Internet communications were on a *per se* basis excluded from the application of the coordination rules, no matter how much money was spent for the Internet activity, no matter what kind of Internet activity was involved, or how closely coordinated between spender and candidate the communication was.

So too, by incorporating the restricted definition of "public communication" into the restricted definition of "generic campaign activity," the Commission enabled state parties to use soft money to fund "generic campaign activities" conducted over Internet. Similarly, the Commission's limited definition of "public communication" allowed state parties to use unlimited amounts of soft money to finance any kind of communication over the Internet that promotes or opposes federal candidates, such as by using soft money to purchase ad space on Web sites for ads that promote the party's federal candidates.

The Commission's rule on its restricted definition of "public communication" was challenged in the *Shays* case. The district court held the regulation to be an impermissible interpretation of the statute and to violate so-called *Chevron* standards, because "Congress did not intend for the Internet to be excluded *per se* from the definition of public communication." 337 F. Supp. 2d at 69 n. 29. At least some forms of Internet communications, the court held, are included in the statutory phrase "any other form of general public political advertising." *Id.* at 70.

The Commission's wholesale exclusion of the Internet from the application of the coordination rules, the court found, would "severely undermine FECA's purposes" and would "permit rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption." *Id.* The court concluded:

> To permit an entire class of political communications to be completely unregulated irrespective of the level of coordination between the communication's publisher and a political party or candidate, would permit an evasion of campaign finance laws, thus "unduly compromis[ing] the Act's purposes," and "creat[ing] the potential for gross abuse."

Id., quoting *Orloski v. FEC,* 795 F.2d 156, 164, 165 (D.C. Cir. 1986). Similarly, the court found the "wholesale exclusion of the Internet from the definition of 'generic campaign activity' to be an impermissible construction of the Act." *Id.* at 108.

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language parallels the definition of "public communication" and the Commission has incorporated that term into its regulation on disclaimers. 11 C.F.R. § 110.11.

In noting the statutory definition of "public communication" includes "any other form of general public political advertising," the district court said that "[w]hile all Internet communications do not fall within this descriptive phrase, some clearly do." *Id.* at 67. In this context, "What constitutes 'general public political advertising' in the world of the Internet is a matter for the FEC to determine." *Id.* at 70.

D. The remand to the Commission. The district court specifically concluded that the Commission rule "excluding the Internet from coordination communication regulations" is in violation of the law, as is the definition of "generic campaign activity." 337 F. Supp. 2d at 130. The court remanded the rule to the Commission "for further action consistent with this Order...." *Id.* at 131; *see also* 340 F. Supp. 2d 39 (denying the Commission's motion for a stay). The Commission did not appeal the district court's rulings on these issues.

This procedural history leads to two conclusions:

First, it is not an option for the Commission to do nothing in this rulemaking. The Commission is under court order to take action to ensure that certain campaign activities conducted on the Internet are treated as "public communications" under 2 U.S.C. § 431(22), and thus fall within the scope of the Commission's coordination rules. The same is true for the rules relating to the definition of "generic campaign activities."

Thus, the Commission cannot close this rulemaking by promulgating no new rule, and be in compliance with the *Shays* decision. It cannot take the position – however ardently argued by some – that campaign activity over the Internet should be entirely free from the campaign finance laws, including, for instance, soft money spending on the Internet by state parties to promote federal candidates. That option, at least insofar as it applies to the definition of the statutory term "public communication," is foreclosed by the *Shays* decision. At a minimum, the Commission *must* modify its regulation defining the term "public communication" to include that campaign activity over the Internet which constitutes a "form of general public political advertising." 2 U.S.C. § 431(22).

Second, to whatever extent the Commission chooses to regulate (or to not regulate) Internet campaign activity beyond that, it is doing so to address issues that arise under FECA, not BCRA, and that are not presented by the Shays decision. Most of the issues raised in the new NPRM – such as a proposed exemption for Internet activity by individuals from the definitions of "contribution" and "expenditure," proposed changes to the scope of the "media exemption," and proposed modifications to the Part 114 rules relating to corporate activity – have nothing to do with the *Shays* case and do not arise from any changes to the statute made by BCRA. Regardless of whether the Commission chooses to move forward on these issues, it is important not to allow the FECA-related portion of this rulemaking to stall or frustrate the mandatory BCRA-related portion that is pending before the Commission on remand from *Shays*.

II. General principles.

There are several general principles that form our framework for analyzing how the campaign finance laws should apply to campaign activity conducted over the Internet:

1. *The growth of the Internet is good for political activity and for increasing the number of small donors in politics.* The Internet has democratizing effects, and its growing role in political discourse should be fostered. Widely available and inexpensive means of political discourse over the Internet, and the power of small donor political fundraising over the Internet, both serve to diminish the role of, and dependency on, big money in American politics. In this sense, the development of the Internet for political discourse should be encouraged because it is consistent with, and furthers the goals of, the First Amendment, the campaign finance laws and our democratic form of government.

2. *It makes no sense to say the Internet stands "outside the law" as a whole, or more specifically, "outside" the campaign finance laws.* The "law" generally *does* apply to activity on the Internet – *e.g.*, copyright law,[4] trademark law,[5] contract law,[6] and tax law.[7] A 501(c)(3)

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[4] Copyright protection exists "in original works of authorship fixed in any tangible medium of expression . . . ." 17 U.S.C. § 102(a). Federal copyright law applies to works of authorship stored (*i.e.*, "fixed") on a computer hard drive and accessible via the Internet. *See* United States Copyright Office, *Circular 66: Copyright Registration for Online Works* <http://www.copyright.gov/circs/circ66.pdf>. By operation of law, a great deal of Web site content is copyrighted. Transmission of copyrighted material using the Internet is likewise regulated by federal law. *See, e.g., A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001) (finding defendant liable for copyright infringement where defendant's Internet-based file sharing service facilitated copyright infringement by service's users).

[5] Applications for registration of trademarks consisting of Internet domain names, for example, are subject to the same requirements as all other applications for federal trademark registration. *See, e.g., In re Oppedahl & Larson LLP.*, 373 F.3d 1171 (Fed. Cir. 2004) (applying legal standards developed in non-Internet-related trademark claims in a software seller's challenge to the U.S. Patent and Trademark Office's refusal to register a trademark for the domain name "patents.com"). Furthermore, the registration or use of an Internet domain name that is identical or confusingly similar to a registered trademark, by someone other than the owner of the trademark who has a bad faith intent to profit, violates federal law. *See, e.g., DaimlerChrysler v. The Net Inc.*, 388 F.3d 201 (6th Cir. 2004). *See also* 15 U.S.C. § 1125(d).

[6] Internet users regularly enter enforceable contracts with sellers of goods and providers of services. The validity of a contract entered into via the Internet is determined according to the same legal standards applied to other contracts. *See, e.g., Register.com v. Verio*, 356 F.3d 393, 403 (2d Cir. 2004) ("While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.").

[7] Organizations exempt from taxation under 26 U.S.C. § 501(c)(3), for example, are prohibited from "participat[ing] in, or intervene[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." As stated in IRS Publication 1828, *Tax Guide for Churches and Religious Organizations* (p. 7) (2004), "[c]ontributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity. Violation of this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise tax." Federal tax law contains no exemption for such statements or other campaign activity over the Internet by section 501(c)(3) groups.

charity, for instance, is prohibited by tax law from "intervening" in political campaigns. If a charity's intervention in campaigns takes place solely on the Internet, that fact does not provide the charity with an automatic exemption from the laws which govern its tax status, simply because it is engaging in its proscribed political activity on the Internet.

3. *The campaign finance laws regulate money, not speech per se.* Typically, money is related to speech because money is needed to facilitate or disseminate speech. Congress has enacted laws – *i.e*, contribution limits, source prohibitions and disclosure requirements – to *regulate the funds* spent to disseminate campaign speech or for other federal campaign purposes. The Supreme Court has repeatedly upheld such laws because that regulation of money serves compelling governmental interests. *E.g., Buckley v. Valeo,* 424 U.S. 1 (1976). Thus, if an individual stands on a soapbox in the town square and gives a speech containing express advocacy, he or she is not spending money, and is thus not subject to regulation under FECA. But if that individual buys TV time to give the same speech, that expenditure of money *is* subject to regulation – at least, in that case, to disclosure as an independent expenditure, and if done in coordination with a candidate, to a contribution limit.

4. *A distinctive aspect of the Internet is that, unlike other media, speech can be widely disseminated for little or (in some cases) virtually no cost.* Absolute costs for speaking on the Internet are very low; marginal costs are even lower. The wide dissemination of speech thus can be far less closely related to money when it is distributed over the Internet than it is when disseminated by off-line forms of mass communications – broadcast, print, direct mail, phone banks, etc., all of which can entail substantial costs just for dissemination. The Supreme Court's underlying assumption in *Buckley* that "virtually every means of communicating ideas in today's mass society requires the expenditure of money," 424 U.S. at 19, is demonstrably less true with regard to the Internet than it is with traditional media. By putting up a Web site, a speaker can disseminate his speech to the whole world – to anyone, anywhere, who calls up his Web site. There is virtually no cost for this dissemination of speech.

5. *Although it is possible to disseminate speech at little or no cost on the Internet, it is also possible to spend very large sums of money in producing or disseminating speech on the Internet.* Large sums can be spent on the Internet to influence elections and to benefit candidates such as, for example, for the production of video ads or other materials for distribution on the Internet, the purchase of e-mailing lists, the purchase of banner or pop-up ads on Web sites, campaign consultants, media advisers, etc. Simply because these large expenditures occur in the context of Internet dissemination should not insulate them from the application of the campaign finance laws.[8]

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[8] To the extent that there is any doubt that the spending of large sums of money on Internet-related activities to influence Federal elections is a growing trend, we urge the Commission to take note of the available reporting and research pertaining to this subject. In a recent article in *Online Media Daily,* political consultant Michael Bassik "forecast that 2006 will be a big year for online advertising in the political sector. 'I think '06 is going to be insane,' he said. 'The amount of work we've done – it's more attention than I've ever seen paid to online.'" S. Gupta, *Consultants: Politicos Coming Around On Online Ads*, ONLINE MEDIA DAILY, May 17, 2005, at http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=30221.

(Footnote continued . . .)

6. *To exempt the Internet, across the board, from all applications of the campaign finance laws would open up the Internet to serve as the vehicle for the flow of soft money into federal elections, contrary to the language, structure and the underlying goals of the campaign finance laws.* For instance, consider a few examples, all of which involve the use of soft money and which, if spent on identical ads in print, or on radio or TV, would not be legal:

- Wealthy individual Jones meets with Senate candidate Smith who, in coordination with Jones, writes a campaign ad that extols Smith's virtues and expressly advocates his election. Jones then spends $100,000 on buying banner ad display space on numerous popular Web sites such as cnn.com or amazon.com to run the

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The Pew Internet & American Life Project has published several studies on the impact of the Internet on political campaigns. Although one study notes that, as of August, 2004, the "primary players in presidential politics" had spent "just $2.66 million" on online banner ads, *see* M. Cornfield, "Presidential campaign advertising on the internet," (Oct. 2004) at http://www.pewinternet.org/pdfs/PIP_Pres_Online_Ads_Report.pdf, a subsequent Pew study concluded that "the internet has become an essential medium of American politics." M. Cornfield, "The Internet and Campaign 2004: A Look Back at the Campaigners," (March 6, 2005) at http://www.pewinternet.org/pdfs/ Cornfield_commentary.pdf, *see also* L. Rainie, "The Internet and Campaign 2004," (March 6, 2005) at http://www.pewinternet.org/pdfs/PIP_2004_Campaign.pdf (noting that 2004 "was a breakout year for the role of the internet in politics." *Id.* at 1). A report published in August, 2004 by the media research firm PQ Media concludes that "Of all nine advertising and marketing communications segments, spending on Internet advertising has seen the fastest growth since 2000, up an estimated 853.8%...." P.Q. Media, "Political Media Buying 2004" (August 2004) at 5, at http://www.pqmedia.com/pmb2004-es.pdf. A story about this study quotes the President of PQ Media as stating, "Eight years ago the Internet was a national medium that wasn't used in the political process. Now it's a vehicle that's used to raise large amounts of campaign money and is being used by candidates to reach niche audiences on a national and local level." A. Gonsalves, "Internet Posts Fastest Growth In Political Spending," TechWeb.com (Aug. 19, 2004), at http://www.techweb.com/wire/30000087

For a small sampling of other pertinent articles and reports describing the continued growth in political spending on the Internet, *see also,* E-Voter Institute, *E-Voter 2002 Study Reveals Internet Use in Senate Races,* (Nov. 13, 2002), at http://www.e-voterinstitute.com/public/rel-search.php?action=list (analysis of 2002 state and local races "that used Internet advertising and email blasts to get attendance at rallies, solicit last minute contributions, and get out the vote"); Jonathan Roos, *Internet top tool for candidates*, (Nov. 17, 2003), at http://www.dmregister.com/news/stories/c4789004/ 22779230.html; Cliff Sloan, *Political Ads + Internet = A Good Fit*, (Jan. 2, 2004), *available at* http://www.newsday.com/news/opinion/ny-vpslo023608369jan02,0,5803906.story?coll=ny-viewpoints-headlines ("All indications are that as the 2004 presidential race gets under way in earnest we will see an explosion of paid political advertising online."); Alexis Rice, *Campaigns Online: The Profound Impact of the Internet, Blogs, and E-Technologies in Presidential Political Campaigning*, (Jan. 2004), *available at* http://www.campaignsonline.org/reports/online.pdf; Dana Milbank, *Curtain Goes Up on Glass-House Attack,* THE WASHINGTON POST, Feb. 15, 2004, at A-4 (Bush-Cheney reelection campaign sent an e-mail to 6 million people with an Internet advertisement attacking Sen. John F. Kerry); *see also* Bob Tedeschi, *E-Commerce Report: Your Web surfing is being interrupted to bring you a paid video commercial. Advertisers think you will stick around*, THE NEW YORK TIMES, Jan. 19, 2004, at C-7 (new ad technology and high-speed connections now allow TV ads to be run on Web pages, evading pop-up blockers).

ad written by candidate Smith. Jones and Smith continue to work together throughout the campaign on ads that candidate Smith writes and Jones places on the Internet through the purchase of Internet ad space as directed by Smith.

- Instead of Jones, the costs of the ad are paid by InterestPAC.

- Instead of Jones or InterestPAC, the costs of the ad are paid by corporation X or labor union Y from its treasury funds.

- After meeting with candidate Smith to discuss the campaign's message and targeting preferences, Jones spends $50,000 to hire a video production company to produce a 60-second video that contains a message written by Smith, expressly advocating Smith's election. Jones then spends $10,000 to purchase a list of email addresses of residents in Smith's state, and sends the video clip as an attachment to the mass email distribution.

- Corporation X or labor union Y spends $100,000 of its corporate or union treasury funds to buy pop-up advertisements on popular Web sites for an ad written by candidate Smith that says in part "Vote for Smith."

- State party Z spends $250,000 in soft money on production of video ads that promote its U.S. Senate candidate, posts those ads on its Web site, and emails them to supporters in the state.

7. *The campaign finance laws should apply to the expenditures of large sums of money to communicate on the Internet, just as they do to expenditures of large sums of money to communicate by traditional media.* The use of large sums of soft money to buy ads in coordination with a candidate on the Internet poses the same dangers of corruption and the appearance of corruption as does the use of such soft money funds to buy ads promoting federal candidates on television and radio, in print advertisements, and other forms of traditional media.

The Internet is not distinctive because it is some kind of *per se* safe haven from the dangers that the campaign finance laws are intended to guard against. Rather, the Internet is distinctive because, unlike traditional media, it allows much more widely disseminated forms of political advocacy to take place much more inexpensively, and thus without always requiring the large sums of money that provoke the dangers addressed by the campaign finance laws.

Given important aspects of the Internet which make it unique, widely available and relatively cheap, the campaign finance laws can and should be read to provide ample breathing room for Internet campaign activities by individuals, so as to not unreasonably burden or constrain such activities. The focus of regulation instead should be on those activities which entail large disbursements of money and which thus – like the use of large sums of money in

traditional forms of media – pose the greatest and most direct threats of corruption and the appearance of corruption that the campaign finance laws are intended to address.[9]

III. Comments on proposed rules.

A. Definition of "public communication." (11 C.F.R. § 100.26)

The NPRM proposes that the definition of "public communication" be modified to include "announcements placed for a fee on another person's or entity's Web site." 11 C.F.R. § 100.26 (proposed); 70 Fed. Reg. at 16977. As noted above, the definition of "public communication" has an impact in two very different contexts: first, on the operation of the coordination regulations (which apply only to "public communications"), and second, to certain provisions of BCRA which define "federal election activity" and which require state parties to spend hard money for generic campaign activities (which are limited to "public communications") and for "public communications" that promote or oppose federal candidates. The definition of "public communication" does *not* affect the scope of the underlying definitions of what constitutes an "expenditure" or "contribution" under the Act.

1. Application to coordination rules. The campaign finance laws provide for different levels of regulation of individuals, corporations and labor unions, and political committees (including party committees). In the context of "public communications" that are to be subject to coordination rules, we believe the definition of what constitutes a "public communication" should reflect these longstanding distinctions drawn by the law.

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[9] We have reviewed the "Internet Principles" drafted by the Center for Democracy and Technology and the Institute for Politics, Democracy and the Internet. *See* http://fec.cdt.org/mockup/Principles_w_background.pdf. To a large extent, these principles are consistent with our own principles set forth above. In particular, we agree, for instance, that:

> Robust political activity by ordinary citizens on the Internet, including their monetary contributions, strengthens and supports the central underlying purpose of the campaign finance law: to protect integrity of our system of representative democracy by minimizing the corrupting influence of large contributions on candidates and officeholders. Individuals' online political activity engages larger numbers of citizens in the political and campaign processes and encourages an increase in smaller contributions.

CDT Principle No. 3. As our specific comments below indicate, we also generally agree that the Commission should not regulate online political activity by individuals, *see* CDT Principle No. 4, except under certain circumstances where large expenditures are involved, and that activity by individual bloggers should also generally be left free from regulation. *See* CDT Principle No. 9.

What is missing from the CDT principles is any acknowledgment of the other side of the coin – that there are circumstances in which large sums of money could be used on the Internet to influence elections, including by political committees, corporations and labor unions, and that the campaign finance laws should apply to such sums of money in order to fulfill the core purposes of the law.

(a). *Individuals.* We support the proposed definition of "public communication" insofar as it applies to communications paid for by individuals. When an individual spends money to buy an advertisement on another person's Web site, and does so in coordination with a candidate, that spending should be treated as an in-kind contribution to the candidate. (We reiterate that the proposed change to this definition does not impair the ability of an individual to spend money on the Internet not in coordination with a candidate, but rather as an "independent expenditure," since the definition of "public communication" does not determine what spending constitutes an "independent expenditure.")

Adoption of this proposed rule would not impair "blogging" activities by individuals, since such activities typically do not involve the expenditure of money in coordination with a candidate to purchase space on another person's Web site.

The failure to adopt the proposed rule would leave open the door for individuals to make large expenditures in coordination with a candidate, so long as the money is spent on the Internet. Individuals could spend unlimited funds to buy banner ads written by the candidate on popular Web sites chosen by the candidate and that urge the election of the candidate. Such coordinated expenditures made for ads that were run on any other form of media would constitute a contribution to the candidate. The same must hold true if the ads are run on the Internet.

As the court in *Shays* recognized, allowing such ads to be run on the Internet free from the campaign finance laws would constitute a major loophole in the law. The failure to adopt this rule, to borrow the court's words, "would permit evasion of campaign finance laws, thus 'unduly compromis[ing] the Act's purposes,' and 'creat[ing] the potential for gross abuse.'" 337 F. Supp. 2d. at 70. The adoption of the proposed rule is required by *Shays.*[10]

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[10] The Commission's proposed rule is unclear about how it would treat potentially very large sums of money spent in coordination with a candidate *to create or produce* campaign materials that an individual disseminates on his or her own Web site. Typically, the Commission treats the costs of producing campaign-related materials the same as the costs of distributing the materials. Thus, the production costs of a TV ad and the costs of the air time to broadcast the ad would both constitute "expenditures." *E.g.* 11 C.F.R. § 104.20(a)(2) (requiring the reporting of "direct costs *of producing* or airing electioneering communications." (emphasis added)). In a related context in the NPRM, as we discuss below, the Commission appears to treat the exemption from the definition of "expenditure" for an individual's "Internet activities" as not including production costs of campaign materials. *See* 11 C.F.R. § 100.155 (proposed) (exemption includes "computer equipment and services"). The Commission has not made clear if the same distinction is intended for the definition on "public communication."

It is important that the Commission regulations guard against schemes that could allow an individual in coordination with a candidate to spend very large sums of money outside the campaign finance laws on the production of ads, if those ads are then disseminated on the individual's own Web site. For instance, a wealthy individual could set up a Web site and then spend very large amounts of money in coordination with a candidate on the professional creation and production of campaign materials – such as campaign videos or other campaign ads – which he then disseminates via his own Web site(or by email). Because the distribution itself would not be considered a "public communication," (*i.e.,* it would not be distribution "for a fee on another person's or entity's Web site"), it would fall outside

(Footnote continued . . .)

(b). *Corporations and labor unions.* The definition of "public communication" for purposes of the coordination rule should reflect the greater restrictions on corporations and unions that are generally applicable under the campaign finance laws, and should take account of spending not just to purchase space on another person's or entity's Web site, but also to otherwise use the Internet – including a corporation's or union's own Web site – to disseminate communications coordinated with a candidate.

Thus, if a corporation or union spends treasury funds to produce a video in coordination with a candidate, and distributes that video by mass email or by posting it on its own Web site, the production costs and distribution costs (*e.g.*, purchase of a mailing list, costs of maintaining the Web site), should be treated as coordinated communications under section 109.21. Treating all corporate and union communications on the Internet as "public communications" would obviate the distinction between payment of a "fee" to obtain space on a Web site, and a corporation or union being given "free" space on another entity's Web site, or space exchanged without a fee for comparable space on another Web site or for the provision of other goods or services. Under the NPRM's approach, these questions of whether there is an in-kind payment for Web space become important to guard against evasion. We think the better approach is to have a broader rule in the corporate and union context that would moot these questions.

We recognize the need to ensure that individuals who act as bloggers but incorporate for liability purposes are not thereby made subject to the panoply of campaign finance restrictions that apply to corporations. By analogy to so-called "MCFL corporations," *see* 11 C.F.R. § 114.10, the Commission should consider whether it has authority to define an exempt category of "blogger corporation" as an incorporated entity whose principal purpose is to conduct blogging activities. Such corporations could be treated as individuals for purposes of the campaign finance rules applicable to Internet activity. This would treat incorporated bloggers as individuals for purposes of the definition of "public communication" (a definition which should otherwise be made generally applicable to corporations), as well as allow incorporated bloggers to take advantage of the exemptions from the basic definitions of "contribution" and "expenditure" for Internet activities by individuals, proposed in the NPRM and discussed below.

(c). *Political committees.* Political committees, including party committees, by definition have a "major purpose" to influence elections. *Buckley,* 424 U.S. at 79. When a

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the coordination rules. If the production costs are also treated as outside the coordination rules, this could lead to a large loophole in the rules on coordinated campaign spending – precisely the kind of loophole that the court in *Shays* indicated should not be permitted.

Certainly, individuals in the normal course of political discourse over the Internet should be free to spend reasonable amounts to prepare materials for distribution over the Internet, without running afoul of the campaign finance laws. But spending above a reasonable threshold for such materials should be treated as an in-kind contribution to the candidate or party, as it is in other such circumstances. Such spending for production costs above a reasonable threshold, such as, for example, $25,000, should be covered by the campaign finance laws. The Commission should consider whether it has the statutory authority to set by rule such a threshold for spending on production costs, or whether it should make a recommendation for Congress to do so.

political committee disseminates information over the Internet, there is no reason to think it is doing so other than for the purpose of influencing an election.

Given this, the definition of "public communication" insofar as it applies to a political committee should include all communications disseminated to the public by the committee via the Internet, just as it includes all communications disseminated via broadcasting. Whatever the manner a political committee spends funds to communicate broadly over the Internet – buying Web site ads, sending emails, maintaining its own publicly accessible Web site – should be considered a means to make "public communications," just as if it were spending funds to communicate by broadcast or mass mailing. Certainly when a political committee operates in coordination with a candidate to spend money on the Internet, the funds spent should be treated as within the scope of the coordination rules, and thus subject to the contribution limits applicable to political committees, even if the spending is done via the committee's own Web site.

2. Application to the definition of "federal election activities" for state party purposes. The term "public communication" has application to two prongs of the definition of "federal election activity," which must be funded with hard money by state parties. State parties must use hard money to fund all "public communications" that promote or oppose federal candidates, 2 U.S.C. § 431(20)(A)(iii), and they must use hard money (or allocated hard money and Levin funds) to pay for generic campaign activities, 2 U.S.C. 431(20)(A)(ii), which the Commission has defined to include only "public communications." 11 C.F.R. § 100.25.

For these purposes, and with application only to state parties, there is no basis for restricting the definition of "public communication" only to fees paid to purchase announcements on another entity's Web site. Certainly the definition should cover at least that, but it should also include disbursements made by a state party for communications *over its own Web site* that promote or attack federal candidates. Without this coverage, a state party would be free to use unlimited soft money on a Web campaign promoting its federal candidates where that Web spending is hosted on the party's own Web site. This campaign could include not only mass mailings by email to supporters promoting or attacking a federal candidate, but also the production of videos distributed via the Internet that promote or attack federal candidates.[11]

The same is true of "generic campaign activities" conducted by a state party. Under the Commission's proposed rule, a state party could use unlimited soft money to fund generic activities conducted over the Internet so long as the state party was not paying another person for space on the other person's Web site. This would allow a state party to use soft money to fund generic activities on its own Web site, even where such activities were intended to, and would have the effect of, influencing federal elections.

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[11] The NPRM raises various questions about how a state party would account for its federal PASO expenses (public communications that "promote, support, attack or oppose" federal candidates) incurred on its own Web site. Because the allocation issue relates to the costs attributable to the Web site as a whole, not just to the costs attributable to a particular federal PASO expense, it would be reasonable for the Commission to require a time/space methodology to allocate the costs of the party Web site between its support of federal and non-federal candidates.

There is no basis for a restricted definition of "public communication" insofar as the term applies to the "federal election activity" of a state party. Because the definition relates directly to the scope of restrictions on soft money spending by state parties to influence federal elections, the term "public communication" should be given broad definition in the state party context to include any communications to the general public over the Internet.

B. Exemptions for "Internet activities" by individuals. (11 C.F.R. §§ 100.94, 100.155)

The NPRM proposes that a new exemption be added to the definitions of both "contribution" and "expenditure" to exclude from those terms money spent by an individual for "Internet activities using computer equipment and services that he or she personally owns for the purpose of influencing any Federal election," whether such activity is independent or coordinated with a candidate or party. 11 C.F.R. § 100.94 (proposed) (contribution); § 100.155 (proposed) (expenditure). "Internet activities," in turn, are defined to include e-mailing, linking, distributing banner messages, blogging and hosting an Internet Web site. 11 C.F.R. § 100.94(b) (proposed).

We support the proposed rules, subject to the clarifications stated below. For the reasons set forth above, the Internet provides individuals with the ability to engage in widely disseminated political discourse without requiring the expenditure of large sums of money. The basic costs for individuals to communicate over the Internet should be deemed *not* to be "contributions" or "expenditures" within the scope of FECA. For sake of clarity, the rule should apply to all "individuals," whether or not they are "volunteers" for a campaign that are "known" to the campaign, or employees of a campaign.

Adoption of this rule would in itself address the vast majority of concerns and objections that have been expressed about this rulemaking. This rule would make clear, appropriately so, that individuals engaging in unfettered political discourse over the Internet using their own computer facilities (or those publicly available) would not be subject to regulation under the campaign finance laws, whether or not such activities are coordinated with a candidate.

So too, this rule would make clear that the widespread practice of blogging by individuals, or responding to blogs, also would not be subject to any regulation under the campaign finance laws.[12]

We do not, however, interpret the proposed rule to contemplate exemptions for large expenditures by individuals that are collateral to the basic costs of engaging in Internet communications. Those basic costs are deemed "computer equipment and services" in the proposed rules, and are defined to include, for instance, basic Internet expenses such as the costs of "computers, software, Internet domain names, and Internet Service Provider (ISP) services." 11 C.F.R. §§ 100.94(c) (proposed), 100.155(c) (proposed). Under the proposed rules, all such

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[12] As we note above, we recommend that an individual (or group of individuals) who choose to incorporate for liability purposes, and where that corporation's principal purpose is to engage in blogging activity, should be treated as an "individual" for purposes of the exemption provided by this rule.

basic costs of speaking on the Internet would be excluded from the definitions of "contribution" and "expenditures."

However, the NPRM notes – correctly in our view – that the Commission "would continue to view the purchase of mailing lists (including e-mail lists) for the purposes of forwarding candidate and political committee communications as expenditures or contributions." 70 Fed. Reg. at 16976.

Similarly, the Commission should make clear that an individual's costs for producing a campaign video, banner ad or other materials are not exempt from the definitions of "contribution" and "expenditure" even if distributed over the Internet, just as such production costs would be within the scope of "expenditure" if the ad were distributed by broadcast, mass mail, telephone banks or other forms of general public communications. As we suggest above, *see* n. 10, we believe this is an appropriate area for the Commission to leave ample breathing room for political activity via the Internet by individuals using their own "computer equipment and services," 11 C.F.R. § 100.155(c) (proposed). The Commission should consider whether it has authority to establish by rule a reasonable dollar threshold (*e.g.,* $25,000) for spending by an individual on production costs for materials to be disseminated via the Internet, where only costs over that threshold would be treated as a "contribution" or "expenditure," or whether it should make a recommendation to Congress to do so.

C. The press exemption. (11 C.F.R. § 100.73)

Since the enactment of FECA, there has been an exemption from the definition of "expenditure" for any "news story, commentary, or editorial" distributed by "any broadcasting station, newspaper, magazine, or other periodical publication...." 2 U.S.C. § 431(9)(B)(i). The Commission's longstanding regulation has implemented this provision by excluding from "expenditure":

> Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, *or other periodical publication....*

11 C.F.R. § 100.132 (emphasis added). The NPRM proposes to add language to the end of this provision to clarify that the term "periodical publication" is applicable "whether the news story, commentary, or editorial appears in print or over the Internet...." 11 C.F.R. 100.132 (proposed).

We support this proposed rule. It strikes the right balance in recognizing, on the one hand, that some media activities protected by the longstanding "press exemption" do now occur "over the Internet," but in also recognizing, on the other hand, that not all activity that takes place on the Internet is *per se* a media activity that is automatically exempt from the definition of "expenditure."

It is certainly correct, as the NPRM commentary states, that the statutory media exemption must be read flexibly to include new forms of media that did not exist when the exemption was enacted in the 1970's. Just as it was appropriate in its 1996 rulemaking for the

Commission to extend the scope of the press exemption to include media activities disseminated by cable television, so too it is appropriate to extend the exemption now to encompass media activities disseminated over the Internet.

But just as it is true that not everything carried on cable television qualifies for the media exemption, so too it is true that not everything disseminated on the Internet constitutes media activities within the meaning of the exemption.

The approach taken by the NPRM is correct in recognizing that the extension of the exemption to the Internet encompasses only "media activities that otherwise would be entitled to the statutory exemption...." 70 Fed. Reg. 16974.

The Commission has developed a body of law through advisory opinions that construe and apply the news media exemption. The Commission has repeatedly said that "several factors must be present for the press exemption to apply." Ad. Op. 2004-07 (April 1, 2004) (citing advisory opinions). They are:

> First, the entity engaging in the activity must be a press entity described by the Act and Commission regulations. Second, an application of the press exemption depends upon the two-part framework presented in *Reader's Digest Association v. FEC,* 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981): (1) Whether the press entity is owned or controlled by a political party, political committee or candidate; and (2) Whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its "legitimate press function").
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> Ad. Op. 2004-07 (citations omitted)

Just as these factors must be present to apply the press exemption to off-line media activities, so too the same factors must be met to apply the exemption to media activities on the Internet. Thus, the Commission's proposed rule does not change the content of the media exemption, or the factors that give rise to it, but rather only clarifies that it is available to media activities which take place online. And as the NPRM notes, the Commission has applied the media exemption "on a case-by-case basis in a wide variety of contexts." 70 Fed. Reg. at 16975 (citing 14 advisory opinions). We would expect the same kind of "case-by-case" application of the rule would be appropriate in applying the exemption to activities on the Internet.

In response to a question posed in the NPRM, we do not believe that the online media exemption should be available only to press entities which have off-line media operations. While most "off-line media operations," such as, *e.g., The Washington Post* or *The New York Times,* also have on-line distributions that qualify for the press exemption, such as, *e.g.,* washingtonpost.com or nytimes.com, it is also certainly true that there are well known Internet publications, such as, *e.g.,* slate.com or salon.com, that meet the standards of the press exemption even though they have no off-line operations.

Finally, we do not believe anyone described as a "blogger" is by definition entitled to the benefit of the press exemption. An individual writing material for distribution on the Internet

may or may not be a press entity. While some bloggers may provide a function very similar to more classic media activities, and thus could reasonably be said to fall within the exemption, others surely do not. The test here should be the same test that the Commission has applied in other contexts – is the entity a "press entity" and is it acting in its "legitimate press function"? Although the different context of the Internet may pose new questions for construing this test and applying it to bloggers, the Commission should develop the law here as it has done generally on the media exemption – on a case-by-case basis, typically in response to advisory opinion requests where it can evaluate specific indicia of press operations.

Simply because a blogger may consider himself as part of the "press" is not the determinative factor. As the district court noted in an analogous context in *McConnell v. FEC,* 251 F. Supp. 2d 176, 236 (D.D.C. 2003) (three-judge court) (*per curiam*), litigants cannot benefit from the Press Clause of the First Amendment "merely by characterizing themselves in their complaints as members of the 'press' because their purpose is to disseminate information to the public."

Rather, the Supreme Court has defined the "press" more carefully. In upholding a comparable press exemption to the Michigan campaign finance laws against an equal protection challenge, the Court said, "[M]edia corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public....A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 667-8 (1990); *see also McConnell,* 540 U.S. at 208.

Indeed, as the NPRM notes, some bloggers have been on the payroll of federal candidates; others overtly solicit funds for candidates. These are not characteristics associated with the media in the off-line context. That fact, and other similar indicia of whether a blogger is acting as a press entity in its "legitimate press function," should be an important consideration in the on-line context in deciding whether to extend the press exemption to a blogger.

We note, however, that if the Commission adopts the proposed exemption for Internet activities by individuals, *see* 11 C.F.R. § 100.155 (proposed), which we support subject to the comments made above, then bloggers do not need to be considered "press entities" in order to be exempt from the campaign finance laws. Their individual activities on the Internet would otherwise be exempt from the definition of "expenditure" under the new rule proposed at section 100.155, and the press exemption, if applicable, would provide only a redundant exemption.

D. Use of corporate and union facilities. (11 C.F.R. § 114.9)

The NPRM proposes to amend 11 C.F.R. § 114.9 to specify that "computers, software and other Internet equipment and services" constitute "facilities" for purposes of the existing rule that allows shareholders and employees of a corporation to make "occasional, isolated and incidental" use of corporate "facilities" in connection with a Federal election. 11 C.F.R. § 114.9(a) (proposed). A comparable proposed rule applies to the provision relating to the use of labor union "facilities" by members and employees of a union. *Id.* at § 114.9(b) (proposed).

We believe that this extension of the existing rules in each case is reasonable, and we support its adoption.

E. Disclaimers. (11 C.F.R. § 110.11)

Section 110.11 of the regulations governs the requirement for including a "disclaimer" on communications that contain either express advocacy or solicitations of contributions. The existing regulation requires disclaimers on "public communications" including, for purposes of this section, more than 500 "unsolicited" and "substantially similar" emails. (Disclaimers must also be put on all disbursements for "public communications" by political committees, not just for express advocacy, but the current rule defines "public communication" for this purpose to include the publicly available Web sites of political committees).

In addition to the change that would result from amendment of the underlying definition of "public communication" in 11 C.F.R. § 100.26, the NPRM proposes to modify the current disclaimer rule by defining "unsolicited" emails to be those sent to email addresses "purchased from a third party." 11 C.F.R. § 110.11(a) (proposed).

We do not oppose the proposed change, which limits the scope of the disclaimer requirement. As a general matter, individuals – including bloggers – should not be required to include a disclaimer on their Internet communications, including those containing express advocacy. We think the two exceptions to this general principle contemplated by the proposed rule are appropriate: that when an individual pays a fee to buy advertising on another person's Web site, which thus constitutes a "public communication," it is appropriate to include a disclaimer on the ad, just as it would be required for an ad on a broadcast or in print media, when the ad includes express advocacy or a solicitation. So too, when an individual is engaged in solicitation or express advocacy through mass emails, it is reasonable to require a disclaimer, as it would be for similar mass mail sent by regular mail. The acquisition of the email address list through a commercial transaction – either a purchase or a commercial "list swap" – is, as proposed by the NPRM, a reasonable proxy for determining when a mass mailing is being made that should trigger the disclaimer requirement. We think "unsolicited mail" should also include mail sent to an email list provided to the sender by a candidate or political committee, whether for a price or at no cost.

We support the Commission's position that political committees should be required to include disclaimers on their Web sites for all disbursements, and that such Web sites are to be treated as "public communications" for this purpose. As we note above, we think that a political committee's publicly available Web site should be treated as a "public communication" for purposes of the coordination rules and "federal election activity" rules as well.

F. Generic campaign activity. (11 C.F.R. § 100.25)

In its BCRA rulemaking in 2002, the Commission adopted a rule to implement the statutory term "generic campaign activity," 2 U.S.C. § 431(21), which is defined by BCRA as "*campaign activity* that promotes a political party and does not promote a candidate or non-Federal candidate." (emphasis added). The Commission's rule limited the scope of the term to

cover only a "public communication" that promotes or opposes a political party and not a candidate, thus excluding forms of "activity" that are not "public communications." 11 C.F.R. § 100.25. Further, given that the regulation implementing the term "public communication" excludes all activity on the Internet, the effect of the two Commission regulations was to completely exclude Internet activity from the definition of "generic campaign activity." The consequence of this exclusion was to allow state parties to spend unlimited soft money for Internet activities that promoted the political party.

In *Shays,* the district court struck down the section 100.25 definition of "generic campaign activity" on two grounds. First, it held that the elimination of the Internet from the scope of the term was contrary to the statute: "the Court finds the wholesale exclusion of the Internet from the definition of 'generic campaign activity' to be an impermissible construction of the Act." 337 F. Supp. 2d at 112. Second, on APA grounds, the court said the Commission had not given adequate public notice that the statutory term would be restricted only to "public communications," and thus that the Commission violated the APA's notice requirement in its rulemaking related to the definition of "generic campaign activity." *Id.* at 113.

The NPRM proposes to remedy the first flaw by maintaining the restricted definition of "generic campaign activity" to include only "public communications," but because the newly proposed definition of "public communication" now includes *some* Internet activity – i.e., an advertisement placed for a fee on another entity's Web site– such Internet activity would also constitute "generic campaign activity."

This is a wholly inadequate remedy. The proposal would require state parties to use hard money (or an allocated mixture of hard money and Levin funds) only for generic ads which a state party pays money to purchase on another entity's Web site. It would continue to allow state parties to spend soft money for generic activity on their own Web sites, because such use of the Internet would not constitute a "public communication." This would continue to allow large disbursements of soft money to be made for generic campaign activities conducted via the Internet on the parties' own Web sites, in contravention of BCRA.

As we discussed above in the context of the definition of "public communication," we believe that when applied to a state party or other political committee, that term should not be restricted to advertisements placed for a fee on another entity's Web site. As we noted above, the definition of "public communication" insofar as it applies to a political committee should include all communications disseminated to the public via the Internet, just as it includes all communications disseminated via broadcasting. Modifying the proposed definition of "public communication" to cover all Internet activity conducted by state party committees would appropriately ensure that at least all generic "public communications" made by parties fall within the definition of "federal election activities" and thus are subject to the hard money funding requirements of BCRA.

As to the second problem, the Commission should not continue to limit the term "generic campaign activities" only to "public communications." Although the court in *Shays* did not hold the limitation to be a *Chevron* violation of the statute, we urge the Commission to adopt a broader definition that includes, as we believe Congress intended, *all* generic "activities."

The Commission's narrowing of the statutory definition, embodied in the existing rule, is striking in a number of respects. A "public communication" is clearly only a subset of "campaign activity." The existing rule blithely equates "generic campaign activity" with a "public communication" without pausing over the fact that Congress, in the passage immediately following the statutory definition of "generic campaign activity," treated the term "public communication" as an entirely distinct concept, which it separately defined.[13] Plainly, had Congress intended to narrow the reach of "generic campaign activity" in the manner the Commission adopted, it could easily have done so – and would have done so.

The Commission's definition of "generic campaign activity" so substantially departs from the plain text of BCRA that the Commission's own general counsel noted that the phrase is "specifically statutorily defined in BCRA ... that's fairly clear on its face, ... [while the amended version constitutes] a somewhat narrower term than 'campaign activity.'" June 19, 2002 Open Meeting Tr. at 225-226. He further cautioned that Congress's use of "public communication" in the same subsection showed that "Congress had already considered" using the term "public communication" in the definition of "generic campaign activity" and "perhaps had rejected [it]." *Id.* at 227.

In narrowing the definition of "generic campaign activity" in this manner, the Commission excluded a broad range of important campaign activity, including mailing and phone banks directed to fewer than 500 people. It thus opened a substantial loophole never authorized by Congress.

We accordingly urge the Commission to adopt a regulatory definition of "generic campaign activity" that is not limited to the continued restrictions imposed on the scope of the term by covering only a "public communication."

IV. Conclusion

We agree with the Commission that the adoption of the proposed rules "would have an extremely limited impact, if any, on the use of the Internet by individuals as a means of communicating their political views, obtaining information regarding candidates and elections, and participating in political campaigns." 70 Fed. Reg. at 16969. Subject to the modifications discussed above, we think the proposed rules strike the right balance in avoiding both over-inclusive regulation that would threaten the free flow of political discourse on the Internet, but also under-inclusive regulation that would open the Internet to the flow of soft money for the purpose of influencing federal elections. Accordingly, and again subject to the changes discussed above, we urge the Commission to adopt the proposed rules set forth in the NPRM.

We appreciate the opportunity to submit these comments.

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[13] *Compare* 2 U.S.C. § 431(21) (definition of "generic campaign activity") *with id.* at § 431(22) (definition of "public communication").

Respectfully submitted,

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